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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

NO. 88-1061 (2)

BEN HAMMOND,

Petitioner,

vs.

AUBURN UNIVERSITY, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review by certiorari a summary judgment for the Respondents which was issued by the United States District Court, and subsequently affirmed without opinion by the United States Eleventh Circuit Court of Appeals, when the Petitioner conceded that there were no material facts in dispute and when the judgment was in accord with the long-standing rule that Federal Courts will not override an academic decision of a college or university unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment?

LIST OF PARTIES

All parties listed by Petitioner as Respondents in this cause are correctly identified, with the exception of Auburn University, which is no longer a party in this case. Auburn University was dismissed as a party to this action at an early stage of the case and has not been a party to any of the appellate proceedings in this cause.

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AUTHORITIES:

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STATEMENT OF THE CASE

Respondents strongly disagree with the Petitioner's "STATEMENT OF RELEVANT FACTS" found on pages 8 through 18 of his Brief. This portion of Petitioner's brief contains assertions and opinions and conclusions which are not correct nor relevant and have no bearing whatsoever in this cause. Rather, Respondents adopt by reference the Findings of Fact in the Opinion of the District Court which are set out on pages 10 through 20 in the Appendix to the Petition for Writ of Certiorari filed herein.

It is significant and controlling that the Findings of Fact made by the District Court were conceded by Petitioner and are not in dispute. This concession by Petitioner was noted in the trial court's Memorandum Opinion as follows:

> During oral arguments, the Plaintiff conceded that there were no material facts in dispute and that this Court could dispose of the issues in this cause as a matter of law.

Hammond v. Auburn University, No. 86-D-0996-E, Memorandum Opinion at p. 2 (M.D. Ala. Sept. 24, 1987) (Emphasis added) [See Appendix to Petition for Writ of Certiorari, p. 9]

The District Court's Findings of Fact, therefore, correctly and accurately depict the factual background in this case.

SUMMARY OF ARGUMENT

Respondents submit that the decision of the United States District Court as affirmed without opinion by the Eleventh Circuit Court of Appeals is correct, and it reached the right result. None of the considerations governing review by

this Court on a Petition for a Writ of Certiorari are present in this cause. There are no special or important reasons for this Court to exercise its discretion to review the Judgment in this cause. The Opinion below is in accord with the decisions of this Court, the Eleventh Circuit Court of Appeals and other U.S. Courts of Appeal. The District Court correctly applied the substantive law to the undisputed material facts. The Petition for a Writ of Certiorari should, therefore, be denied.

ARGUMENT

The District Court's judgment and well-reasoned opinion do not conflict with any applicable decisions of this Court. In cases dealing with challenges of academic decisions, this Court has consistently held that the courts should

maintain a very limited role and should exercise judicial restraint and deference toward the academic institution. The controlling rule was stated in Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78 (1978), 98 S.Ct. 948, 55 L.Ed. 2d 124 (1978) as follows:

> University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.

Also,

> If a "Federal Court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," Bishop v. Wood, 426 U.S. at 349, 48 L.Ed. 2d 684, 96 S.Ct. 2074, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions--decisions that require "an expert evaluation of cumulative information and are not readily adapted to the procedural tools of judicial or administrative decision making."

This Court has concluded that:

> When judges are asked to review the substance of a genuinely academic decision such as this one, they should show great respect for the faculty's judgment . . . . Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Regents of the University of Michigan v. Ewing, 474 U.S. 214, 88 L.Ed. 2d 523, 532, 106 S.Ct. 507 (1985).

Clearly, the decision here not to allow Petitioner to register for electrical engineering courses was purely an academic decision based solely on Petitioner's dismal academic performance. It did not violate any of the Petitioner's due process rights. As stated by the District Court in its Memorandum Opinion, "It is obvious, no evidence having been submitted to the contrary, that the actions taken by the defendants

toward the Plaintiff [Petitioner] were not disciplinary in nature." Hammond v. Auburn University, No. 86-D-0996-E, Memorandum Opinion at p. 12 (M.D. Ala. Sept. 24, 1987) [See Appendix to Petition, p. 30]. In accordance with the decisions of this Court, the District Court then concluded as follows:

> [T]hat the widest possible range of discretion must be afforded university faculties in their evaluation of a student's academic performance and eligibility to promotion or graduation. Clearly, this Court can only review an academic decision in light of whether or not the "person or committee responsible did not actually exercise professional judgment." Regents of the University of Michigan v. Ewing, 474 U.S. ___, 88 L.Ed. 2d 523, 106 S.Ct. 507 (1985).

Hammond v. Auburn University, No. 86-D-0996-E, Memorandum Opinion at p. 13 (M.D. Ala. Sept. 24, 1987) [See Appendix to Petition, p. 32]

Accordingly, the Judgment here does not conflict in any way with any case of this Court involving academic decisions by a college or university. Further, the Judgment of the District Court is in accord with rulings by the Eleventh Circuit Court of Appeals, which have adopted the same standard of review announced by this Court in Ewing. See for example, Haberle v. The University of Alabama in Birmingham, 803 F.2d 1536 (11th Cir. 1986).

Petitioner's remaining federal claim of an alleged violation of equal protection was also correctly denied by the District Court. Petitioner's theory on this claim was based upon his assertion that other state universities in Alabama have degree requirements which would have permitted him to take courses leading to a degree in electrical engineering. However, Petitioner offered no

evidence that other students within the College of Engineering at Auburn University were treated any differently from the Petitioner. This finding was stated by the District Court in its recitation of the undisputed facts as follows:

> The plaintiff has offered no other evidence of students within the College of Engineering who, in the same or similar position, were treated any differently from the plaintiff.

Opinion, p. 17 [See Appendix to Petition, p. 42]

In rejecting Petitioner's equal protection claim, the District Court correctly relied upon this Court's decision in Ross v. Moffitt, 17 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974). Maintaining a proper equal protection analysis, the District Court looked to see if persons similarly situated to Petitioner had been treated differently,

and found, as conceded by Petitioner, that:

> [T]here is no evidence that any electrical engineering students in the same position as the Plaintiff have been treated differently from the Plaintiff.

Opinion, p. 18 [See Appendix to Petition, p. 44]

In view of the foregoing, Petitioner has wholly failed to establish that the decision by the United States Eleventh Circuit Court of Appeals falls under any of the criteria necessary for a review by this Court on Writ of Certiorari.

Neither can Petitioner argue that the lower Court's ruling decided an important question of Federal law which has not been settled by this Court or that it decided a Federal question in a way which is in conflict with an applicable decision of this Court. See, Rule 17.1.(c), Rules of the Supreme Court of the United States.

This Court has consistently rendered numerous decisions on the limited judicial review of academic decisions by universities and colleges. Further, Petitioner has not and cannot show that the Eleventh Circuit has rendered a decision in conflict with the decision of any other U.S. Court of Appeals on the issues here or that it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise by this Court of its power of supervision. The cited cases decided by this Court were followed by the District Court and the Eleventh Circuit. No other U.S. Court of Appeals has issued any ruling adverse to the judgment in this case.

CONCLUSION

Review on writ of certiorari is a matter of sound judicial discretion and will be granted only where there are special and important reasons therefor. There are no such special or important reasons for this Court to review the decisions by the United States Eleventh Circuit Court of Appeals and the United States District Court in this case. Such decisions were eminently correct and were based on a correct application of substantive law to the undisputed facts. None of the criteria for granting certiorari are present in this case.

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be denied by this Honorable Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Opposition to Writ of Certiorari has been served upon Petitioner, Ben Hammond by mailing a copy of same to him at Box 486, Arab, AL 35016 in the United States mail, properly addressed, first-class postage prepaid, on this the 20th day of January, 1989.

OF COUNSEL